No. 71-422

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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In The

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No. 71-422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, on the grounds that it is manifest that the questions on which decision of this appeal depends are so unsubstantial as not to require further argument.

COUNTER-STATEMENT OF THE CASE

This appeal raises the question of the constitutional validity of Act 167 of the Public Acts of 1970, State of

Michigan (Appendix A). The state statute, as here pertinent, provides:

"Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

"* * *

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and

comply with the federal marine and navigation laws and regulations."

On March 16, 1971, appellants instituted action in the District Court pursuant to Sections 1331, 1333, 1337, 2201, 2281 and 2284 of Title 28, USC. A temporary order issued on that date, restrained enforcement of the state statute by appellees and was extended to April 26, 1971, the date set for hearing by the three-judge court pursuant to Title 28, USC, § 2284.

The major issues presented by appellants to the trial court were:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U.S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies appellants due process and the equal protection of the laws.

5. That the language and provisions of the Michi-

gan Water Pollution Act are unconstitutionally vague and, thus unenforceable.

On April 26 and 27, 1971, a full evidentiary hearing was conducted, following which the Court heard oral arguments and requested submission of briefs.

On July 12, 1971, the District Court rendered its Memorandum Opinion dissolving the temporary restraining order and dismissing the action without prejudice to appellants instituting other appropriate legal proceedings (Appendix B).

On July 29, 1971, appellants filed motion to reinstate the temporary injunction pending appeal and, on September 15, 1971, the District Court rendered its Opinion and Order, (Appendix C), denying appellants' motion to reinstate the temporary restraining order originally entered March 16, 1971.

In denying appellants' motion to reinstate the temporary injunction, the District Court ruled that an injunction from the federal court suspending possible enforcement of the Michigan statute is not appropriate until the statute has been interpreted by a state tribunal, relying upon *Askew* v *Hargrave*, 401 US 476 (1971) and *Reetz* v *Bozanich*, 397 US 82, 85 (1970).

The Trial Court's Memorandum Opinion, dated July 12, 1971, held, in significant part:

> "With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham*, 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

> "With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course."

The factual findings made by the Trial Court, as a basis for decision, established that:

1. The Michigan legislature, recognizing the need for pollution control devices and systems, has enacted Act 167 of the Public Acts of 1970, commencing its implementation by first enforcing the requirements relating to pleasure craft and then approaching owners and operators of Great Lakes commercial cargo vessels with the sole objective of effecting voluntary compliance within a reasonable time.

2. Total retention holding tanks have been installed on each of the commercial vessels of Ford Motor Company at nominal installation, and pump-out costs per ship, and other total retention systems are being tried aboard other commercial vessels, including four Canadian Registry vessels and the vessels of appellants.

3. Appellees, in seeking the voluntary cooperation of appellants in the implementation of Act 167, supra, have not instigated nor threatened criminal prosecution authorized under Section 11 of the state statute.

4. The injunctive relief initially granted by the Trial Court was sought solely in anticipation that other state governmental units might act, presumably in the imminently near future, and that such action would in fact

conflict with Michigan standards; and that appellants' fear of irreparable injury was merely anticipatory and based solely on speculation.

5. The Wisconsin legislature has introduced legislation regulating sewage discharges from commercial vessels into the waters of that state. In this connection, the Attorney General informs this Court that the Minnesota legislature has recently approved a bill requiring total retention holding tanks for pleasure craft, and that overboard disposal of wastes from such watercraft is now prohibited in Illinois, Indiana, Michigan, Minnesota, New York, Wisconsin and Ontario.

6. The initial standards and regulations of the Federal Water Pollution Control Act, as amended (33 USC Section 1151, et seq), will not become effective for new vessels of appellants for two years after promulgation and, for existing vessels, until five years after promulgation. [Section 1163(c)(1)].

7. Section 13 of the federal statute authorizes application by a state to the Environmental Protection Agency for a regulation prohibiting discharge of *any* sewage into state waters. The Attorney General informs the Court such application has been made by the governor of the State of Michigan under date of June 8, 1971 (Appendix D).

8. Appellants' expressed fear that appellees may administratively interpret Act 167, supra, to require installation of huge holding tanks (40,000 gallons) for all treated materials is without basis for assertion, the Michigan legislature having drawn distinction between prohibited discharges of noxious materials in Section 3(1) of the Act, and the discharge of "sewage," defined in Section 2(d) as ". . . all human wastes, treated or untreated," requiring total retention holding tanks or incinerating

devices for human wastes only, which legislative interpretation has been administratively approved by appellees.

9. That upon the evidence presented, appellants seek merely an advisory opinion of the Trial Court that would bar state action in the field of the Great Lakes pollution until such time as the federal government assumes control, if it does, to prevent the discharge of untreated or inadequately treated sewage into the navigable waters of the Great Lakes.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The central question posed by this litigation is whether the United States government, by enactment of the Federal Water Pollution Control Act, as amended, has the sole authority under the doctrine of pre-emption to regulate the field of pollution control in the waters of the Great Lakes to the exclusion of the State of Michigan.

The doctrine of federal pre-emption has its roots in Article VI, Clause 2 of the United States Constitution, the "Supremacy Clause," which elevates federal law above that of the states. On the other hand, under the 10th Amendment of the federal constitution, "the powers not designated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

Thus, in any inquiry into federal pre-emption, it must be initially determined that congressional action establishing federal regulation in a particular field has been undertaken pursuant to one of the powers delegated to the United

States by the Constitution, *Rice* v *Santa Fe Elevator Corp.*, 331 US 218, 229-230 (1947).

Once that issue is ascertained, the crucial question is whether Congress has exercised that power in such manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter.

The key factors in the determination of whether Congress has pre-empted a particular area so as to preclude state attempts at dual regulation include:

1. The aim and intent of Congress as revealed by the statute itself.

2. The pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency.

3. The nature of the subject matter regulated and whether it is one which demands exclusive federal regulation in order to achieve uniformity vital to national interests.

4. Whether, under the circumstances of a particular case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In applying these principles, the standards to be adhered to in determining whether federal pre-emption exists have been clearly stated in *Florida Line & Avocado Growers, Inc.* v *Paul*, 373 US 132, 142 (1963), which states:

"The test of whether both federal and state regulation may operate, or the state regulations must give

way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The tests there stated are the appropriate tests to be applied here, since the only significant point of difference asserted is whether Congress has "unmistakably" expressed an intent to pre-empt the field of Great Lakes pollution control.

This Court has uniformly recognized the legitimate interest of the state in its laws designed to protect the health and safety of its citizens and has refused to find federal pre-emption over state health and safety laws, absent a clear and unmistakable showing of an intent on the part of Congress to pre-empt. *Brotherhood of Locomotive Engineers* v *Chicago, Rock Island & Pacific Railroad Co.*, 382 US 423 (1966) (reversing 239 F Supp 1); *Huron Portland Cement Co* v *City of Detroit*, 362 US 440 (1960); *Terminal Railroad Association of St. Louis* v *Brotherhood of Railroad Trainmen*, 318 US 1 (1942) *Reid* v *Colorado*, 187 US 137 (1902).

The state law here under consideration clearly falls in the category of laws designed to protect the health and safety of the citizens of this state.

Obviously, Congress knew how to establish federal pre-

emption in the federal statute by expressly providing therefor in clear language. The Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, reflects no clear intent to pre-empt the field involved in this appeal. Indeed, Congress, in addressing itself to water pollution, in the federal statute, 33 USC §1151, stated in Section 1(c):

> "Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters [including boundary waters] of such States."

Further, Section 1(b) of the Water Pollution Control Act declares that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution."

Section 10 of the federal statute provides that except where the Attorney General has actually obtained a court order of pollution abatement on behalf of the United States, "State and interstate action to abate pollution of . . . or navigable waters . . . shall not . . . be displaced by federal enforcement action." 33 USC §1160.

The Environmental Quality Improvement Act of April 3, 1970 (84 Stat 114; 42 USC §4371), in stating the general policy of Congress in protecting the environment, also states "The primary responsibility for implementing this policy rests with State and local governments." 42 USC §4371(b)(2).

It is thus clear that the Federal Water Pollution Control Act, as amended, has not signified a congressional intention to pre-empt concurrent state control of the discharge of untreated, or inadequately treated, sewage into

the navigable waters of the Great Lakes, and its connecting waterways.

Appellees have conceded that federal pre-emption will take place when the initial standards and regulations federally promulgated become effective (For new vessels, two years after promulgation, and for existing vessels, five years after promulgation).

The Environmental Protection Agency has declared "Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards" and "appropriate flow through devices meeting this standard may not have yet been developed for certain classes of vessels covered by the proposed regulation," and "that until such effective dates, the States have the authority to adopt and enforce their own statutes and regulations on this subject without federal participation." (18 CFR, Part 640, May 12, 1971; Appendix E).

Consequently, there exists no legal basis for concluding that the subject matter sought to be regulated by Michigan is one presently demanding "exclusive federal regulation . . . to achieve uniformity vital to the national interests," or that the state statute represents an obstacle to the accomplishment and execution of the purposes and objectives declared by Congress, as carried into effect by the Environmental Protection Agency. Nor does there exist technological obstacles, unrelated to the corporate attitudes of appellants, which would make installation of holding tanks and devices contemplated by the state statute unfeasible.

Neither is a need for "national uniformity" established by appellants by reason of federal licensing of their vessels. Appellants' Jurisdictional Statement (page 18)

therefore fails to support the conclusion that states may not impose a requirement that federally licensed vessels install pollution equipment.

This Court has unequivocally ruled that federal ship inspection standards, or mere possession of a federal license, does not immunize appellants from the operation of normal incidents of state police power and, further, that state requirements so imposed do not unduly burden these licensees, or otherwise impose such restraint as to be constitutionally invalid. *Huron Portland Cement Company* v *City of Detroit,* 362 US 440; 4 L Ed (2d) 852, 858-859; 80 S Ct 813 (1960).

Also present here is a separate and distinct issue, namely, the doctrine of abstention. The sensitive nature of our system which involves both State and National interests has produced a long standing public policy against federal court interference with state court proceedings. See, *Fenner* v *Boykin,* 271 US 240 (1926); *Younger* v. *Harris,* 401 US 37 (1971). An exception to this policy, however, was recognized in *Dombrowski* v *Pfister,* 380 US 479 (1965), where a complainant alleged misuse of state law to harass him and to discourage his supporters from asserting their constitutional rights.

This Court has reviewed the impact of *Dombrowski* recently in several cases. In *Younger* v. *Harris,* 401 US 37 (1971), for instance an action was brought in federal court to enjoin prosecution under a State Syndicalism Act alleging that the prosecution and the statute had a "chilling effect" upon the exercise of free speech rights. This Court held in *Younger* that the *Dombrowski* exception was quite narrow and that federal courts should not enjoin state proceedings unless " 'great and immediate' irreparable injury" is established.

Similarly, in *Samuels* v. *Mackel,* 401 US 66 (1971), an action was brought in federal court seeking a declaratory judgment holding a state criminal anarchy statute unconstitutional. This Court held that the standards as expressed in *Younger* v. *Harris,* 401 US 37 (1971), apply even though declaratory relief rather than injunctive relief was involved. The policy and rule of *Younger* and *Samuels* read together was succintly stated by this Court to be as follows:

> "As our holdings today in *Younger* v. *Harris, ante,* and *Samuels* v. *Mackell, ante,* show, the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here." *Boyle* v. *Landry,* 401 US 77, 81 (1971).

In the instant case, appellants seek to raise the constitutional validity of a Michigan criminal statute in federal court. There is no establishment by the appellants, however, of great and immediate irreparable harm as is required for federal court intervention under the *Younger* and *Samuels* reasoning. At best, appellants seek to block a state criminal law statute on "nothing more than speculation about the future."

Additionally, this Court has consistently applied the concept that "proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional issues." *City of Meridian* v. *Southern Bell Telephone and Telegraph Co.,* 358 US 639, 640-641, 3 L-Ed

2d 562, 563, 79 S Ct 455 (1959); *Fornaris* v. *Ridge Tool Co.*, 27 L Ed 2d 174, 91 S Ct 156 (1970); *Reetz* v. *Bozanich*, 397 US 82, 86, 25 L Ed 2d 68, 72, 90 S Ct 788 (1970). It cannot be denied that Act 167 of the Public Acts of 1970, State of Michigan, involves unsettled questions of State law.

The justifiable reluctance of this Court to exercise jurisdiction over complex, scientific issues in pollution cases of this nature, not calling for resolution of important problems of federal law, was recognized also in *State of Ohio* v. *Wyandotte Chemical Corporation*, 28 L Ed 2d 256 (1971).

In the light of these sound and persuasive authorities, it is respectfully submitted there exist compelling reasons for invocation of the doctrine of abstention here.

The appellants also urge that the Michigan statute (a) denies due process and equal protection of the laws and (b) imposes an undue burden on interstate commerce. The evidence presented to the Trial Court established that the burdens, if any, of statutory compliance rest equally upon recreational watercraft and commercial carriers and, further, that interstate carriers of the class represented by appellants have voluntarily complied with the state statute.

This Court in *Morey v. Doud*, 354 US 457, 463, 77 S Ct 1344, 1 L Ed 2d 1485, 1490 (1957) has stated the established principle that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." In *Williams* v *Lee Optical Company*, 348 US 483, 488 (1955), this Court further ruled that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions." Justice Potter Stewart, in *Huron Portland Cement Company* v *City of Detroit, supra*, has recognized "that legislation designed to free from pollution the very air that people breathe

clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." More recently this Court, in *Pike* v *Church*, 397 US 137 (1970), has held that where a state statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burdens imposed on such commerce are clearly excessive in relation to the local benefits conferred.

The commerce clause does not, by itself, exclude the states from legislating on matters relating to the health, life and safety of their citizens, even though such legislation may materially affect interstate commerce. *Head* v *New Mexico Board of Examiners in Optometry*, 374 US 424, 83 S Ct 1759, 10 L Ed 2d 983 (1963); *Huron Portland Cement Company* v *City of Detroit, supra; Cohen* v *Bredehoeft*, 290 F. Supp 1001, 1003 (1968) affd 402 F 2d 61 (US Dist Ct, Texas).

Nor is this settled principle diluted by ruling of this Court in *Bibb* v *Navajo Freight Lines*, 359 US 520 (1959), as suggested by appellants' Jurisdictional Statement (page 18). The *Bibb* decision was fully considered, and rejected, as a controlling basis for decision by this Court in sustaining the validity of the State of Arkansas "full crew" statutes against challenges made under the commerce clause and the Fourteenth Amendment. *Brotherhood of Locomotive Firemen and Enginemen et al* v *Chicago, Rock Island and Pacific Railroad Company, et al*, 393 US 129, 21 L Ed 2d 289, 89 S Ct 323, reh den 393 US 1045 (1968).

One of the most important duties of state government is protection of the public health, safety and welfare. *Johnson et al* v *Genesee County, Michigan, et al* 232 F Supp 567, 571 (1964). Legislation fulfilling that duty clearly falls within the state's police power and is not

violative of the Fourteenth Amendment so long as there is a real and substantial relationship, plainly present here, between the statute and the purpose of protecting the health, safety and welfare.

Measured by these standards, Act 167 of the Public Acts of 1970, State of Michigan, is valid and constitutional in all respects.

Appellants' final argument urges that the statutory language of Section 3, Act 167 of the Public Acts of 1970, State of Michigan, is so vague as to be incapable of enforcement. Specifically, appellants challenge the meaning of the term "detrimental to the public health and welfare," as employed in Subdivision 1, Section 3. Appellants have not cited a single authority to the Trial Court in support of the contention. The legislative guide there set forth is preservation of the public health and welfare and, because of varying degrees of pollution which might detrimentally affect the public health of its citizens, the Michigan legislature wisely did not undertake to enumerate them.

In responding to the charge that a penal statute of the Interstate Commerce Commission was unconstitutionally vague, this court in *Boyce Motor Lines Inc.* v *United States of America,* 342 US 337, 340 (1952) noted that statutes must deal with "untold and unforeseen variables in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions."

As Justice Hughes wrote in *Appalachian Coals, Inc. et al* v *United States of America,* 288 US 344, 359-360 (1933), in sustaining the broad language of the Sherman Anti-Trust Act, ". . . It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by provid-

ing loopholes for escape." Of the standards legislatively established, the Court stated the Act's "general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." Plainly, the Michigan statute here challenged adequately describes a judicially enforceable standard of reasonableness under all tests established by this Court.

Moreover, it is the judicial role to look at the statute as a whole, and the practical context from which it emerges, to determine legislative intention. Once that legislative policy is articulated, it is plainly the Court's role to implement, not frustrate, that policy.

Plainly, the term "public health, safety and welfare" is a familiar legal phrase that has been the subject of public and private nuisance law for centuries, *Renken* v *Harvey Aluminum, Inc.*, 226 F Supp 169, 175-176 (US Dist Ct, Oregon, 1963). Nor can it be denied that pollution of Michigan waters by appellants is a public nuisance. No one would seriously urge that the law of nuisance is constitutionally vague, even though it is manifest that the doctrine necessarily proceeds from broad principles.

The policy behind the Michigan Water Pollution Control Act is well understood. The Michigan legislature has concisely stated its desire that all persons examine with care the cost to society of their activities, and to consider the range of alternatives statutorily provided to protect the public right to environmental quality of Michigan waters.

So tested, it is abundantly clear that Section 3 of the Michigan statute is not unconstitutionally vague, and that the claim of constitutional infirmity alleged by appellants is so unsubstantial as not to warrant further consideration by this Court.

CONCLUSION AND PRAYER

WHEREFORE, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to require further argument, and appellees respectfully moye the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the United States District Court, Eastern District of Michigan, Southern Division.

Respectfully submitted,

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DATED: October 25, 1971

APPENDIX

Appendix A

STATE OF MICHIGAN

ACT 167, PUBLIC ACTS OF 1970

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970".

Sec. 2. As used in this act:

(a) "Act" means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including, but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction,

may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marina owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July, 1971 provide pump-out facilities approved by the department of public health for marine toilet holding tanks or pleasure and commercial watercraft.

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owner, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.

Sec. 6. An applicant for a boat plate registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a pollution control device as required by this act. The commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring purposes to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all water-

craft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

Sec. 12. This act shall take effect January 1, 1971.

This act is ordered to take immediate effect.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	CIVIL ACTION No. 36194

MEMORANDUM OPINION

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and conflicts with federal legislation, and correspondingly, re-

quests that the State of Michigan be enjoined from enforcing that Act.

A three judge Court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the Great Lakes, the connecting waterways and tributaries

and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the vessel is devoted to cargo. Crew sizes range from 30 to 35 men

per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed biogest systems. Other systems are also being tried empirically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970, (a copy of which is attached hereto as Appendix A) as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

> Sec. 4. (2) A person owning, operating or other-

wise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ". . . all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" materials.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks

to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, supra, which has as one of its major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designated to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 (b) (1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c)(1).) Subsection (f) of Section 1163 prohibits any state from enforcing any statute or regulation with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state

may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into the waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake, Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may, administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to, their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization—nor even a person—who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately. There are few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Great Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000 gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding

tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

Wilson v. *Schnettler,* 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden,* 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . . ." *Douglas* v. *City of Jeannette, supra,* at 163.

A later exposition of the principle is contained in *Dombrowski* v. *Pfister,* 380 U.S. 479, where it was said (pages 484, 485):

> ". . . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

The impact of *Wilson* and *Dombrowski* is a pervading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See *Doe* v. *Randall,* 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson* v. *Randall,* 39 L.W. 3505.)

Nor is there any intimation that the "necessary operation" of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521) provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in *Public Service Commission of Utah, et al.,* v. *Wycoff Company, Inc.,* 344 U.S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation

that may be under consideration but has not yet shaped up into an enactment."

And went on to say, (pages 247, 248):

"Declaratory proceedings in the ~~federal~~ courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata,* so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.,* 228 U.S. 22; *Taylor* v. *Anderson,* 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making". The Notice an-

nounces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice to plaintiffs to institute other appropriate judicial proceedings.

GEORGE C. EDWARDS, JR. /s/
George C. Edwards, Jr.
United States Circuit Judge

DAMON J. KEITH /s/
Damon J. Keith
United States District Judge

PHILIP PRATT /s/
Philip Pratt
United States District Judge

Dated: July 12, 1971.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	CIVIL ACTION NO. 36194

OPINION AND ORDER

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge.

Plaintiffs in this proceeding have filed a motion requesting a continuation of the temporary restraining order entered prior to the hearing in this cause or other similar injunctive relief to prevent enforcement by the State of Michigan of Act 167, Public Acts of 1970, pending an appellate court ruling on this Court's opinion and order of July 12, 1971. The effect of the July 12, 1971 order was to dissolve the pre-existing temporary restraining order and dismiss the action.

Plaintiffs' motion was accompanied by an extensive brief as was defendants' response in opposition to the motion.

By agreement of the parties, the motion will be considered on the briefs without oral argument.

The authority of this Court to grant an injunction is not questioned. It continues throughout the period of appeal. Federal Rules of Civil Procedure Rule 62(c), 28 U.S.C.; *Newton* v. *Consolidated Gas Company,* 258 U.S. 165, 177 (1922); *United States* v. *El-O-Pathic Pharmacy,* 192 F.2d 62, 79 (C.A. Cal. 1951).

However, the Rule provides that the decision to grant an injunction is a matter within the discretion of the Court. It is, therefore, incumbent upon plaintiffs to establish that immediate and irreparable injury will result if injunctive relief is withheld. This plaintiffs have not done.

This Court's earlier opinion indicated that an injunction from a federal court suspending the possible enforcement of the Michigan statute was inappropriate until the statute had been interpreted by a Michigan Court. Thus this Court dissolved the existing temporary restraining order, dismissed the action, and abstained from further determinations. This holding is strengthened by the recent decision of *Askew* v. *Hargrave,* 401 U.S. 476 (1971) which strongly endorsed the abstention guidelines of *Reetz* v. *Bozanich,* 397 U.S. 82, 85 (1970).

Moreover, plaintiffs have indicated no change in the facts of this case nor the attitudes of those Michigan officials charged with enforcing the statute in question that would indicate a threat of immediate and irreparable harm to plaintiffs. In their response to the motion, defendants have again indicated that the State of Michigan hopes to obtain compliance with its water pollution standards without resort to criminal prosecution. To enjoin the enforcement of a statute under which prosecution is neither pending nor foreseeable would be an idle gesture.

For the reasons given, plaintiffs' motion must be DENIED. IT IS SO ORDERED.

GEORGE C. EDWARDS, JR. /s/
George C. Edwards, Jr.
United States Circuit Judge

DAMON J. KEITH /s/
Damon J. Keith
United States District Judge

PHILIP PRATT /s/
Philip Pratt
United States District Judge

Dated: September 15, 1971.

U. S. District Court
Eastern District of Mich. } ss

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk
By ?????? ?? _____
Deputy Clerk

Dated:

Appendix D

STATE OF MICHIGAN

Office of the Governor

LANSING

WILLIAM G. MILLIKEN
Governor

June 8, 1971

Mr. William D. Ruckelshaus
Administrator
Environmental Protection Agency
1129 20th Street, N.W.
Washington, D. C. 20460

Dear Mr. Ruckelshaus:

The State of Michigan, through this correspondence, hereby requests the Administrator of the Environmental Protection Agency to issue a regulation completely prohibiting the discharge from all vessels of any sewage, whether treated or not, into Michigan's portion of the Great Lakes Erie, Huron, Michigan, Superior, the connecting channels thereof and all other Michigan waters subject to Section 13 of the Federal Water Pollution Control Act.

All Michigan Great Lakes interstate waters are protected for domestic water supply use except the lower Detroit River, and they are also protected for total body contact recreation except at the mouths of major river tributaries and in the immediate vicinity of wastewater treatment plant outfalls. These standards and exceptions, which have been approved by EPA and are joint state-federal standards, can only be assured by careful regulation of waste collection and treatment systems, including the proper location of the fixed point of discharge of the treated effluent.

Mechanical flow-through treatment devices and facilities, even with the best operation and maintenance, are subject to periodic upsets, breakdowns and malfunctions. It is reasonable to expect that flow-through treatment devices on board watercraft and vessels will be subject to even greater operational problems than those land-based facilities under the superintendence of skilled, state-certified municipal and industrial waste treatment plant operators.

The State of Michigan requests your early issuance of a "no sewage discharge" regulation for all Michigan waters, in order that the people of our state can be guaranteed the high quality water now being enhanced and maintained under this state's current water pollution control program.

Sincerely,

WILLIAM G. MILLIKEN /s/
Governor

Appendix E

FEDERAL REGISTER
PROPOSED RULE MAKING 8739

WEDNESDAY, MAY 12, 1971
WASHINGTON, D.C.

Volume 36 — Number 92

ENVIRONMENTAL PROTECTION AGENCY

[18 CFR Part 640]

STANDARDS OF PERFORMANCE FOR MARINE SANITATION DEVICES

Notice of Proposed Rule Making

Notice is hereby given that the Administrator of the Environmental Protection Agency proposes to amend Chapter V of Title 18, Code of Federal Regulations, by adding a new Part 640, as set forth below.

The proposed regulation would promulgate Federal standards of performance for marine sanitation devices. Section 13 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1163, directs the Secretary of the Interior to promulgate Federal standards of performance for marine sanitation devices. The authority and functions of the Secretary of the Interior under section 13 were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970. The proposed regulation was formulated after consultation with the Department of Transportation and after consideration of the economic costs involved and the limits of available technology.

The proposed regulation would require marine sanitation devices to provide a high level of treatment which will be approximately the equivalent of the secondary treatment standards for municipal waste facilities. Such regulation would meet the standards specified in § 640.2, for any sewage permitted to flow through.

It is recognized that appropriate flow-through devices meeting this standard may not have yet been developed for certain smaller classes of vessels covered by the proposed regulation. However, it is believed that the development of such devices prior to the effective date of the standards is within the limits of available technology. Accordingly, the performance standards proposed herein are considered to be practicable and reasonable. Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards.

Under section 13(b)(1) of the Federal Water Pollution Control Act, as amended, the Secretary of Transportation has the responsibility to promulgate regulations, consistent with the standards adopted by the Administrator, governing the design, construction, installation, and operation of marine sanitation devices. In this connection, section 13(c)(2) permits the Secretary of Transportation, after consultation with the Administrator, to distinguish among classes, types, and sizes of vessels as well as between new and existing vessels, and to waive applicability of standards and regulations as necessary or appropriate for such classes, types, and sizes of vessels. The Administrator will continue to cooperate and consult with the Secretary of Transportation in connection with the discharge of the Secretary's responsibilities under section 13.

Initial standards and regulations promulgated under section 13 preempt any statute or regulation of a State or

political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to section 13. However, such preemption does not take place until the effective date of the initial standards and regulations. The initial standards and regulations become effective for new vessels two years after promulgation, and for existing vessels five years after promulgation.

Under section 13(f) of the Act, any State may apply to the Administrator for issuance of a regulation prohibiting the discharge from a vessel of any sewage (whether treated or not) into certain delineated areas of waters of the State, and the Administrator shall issue such regulation where he determines that any applicable water quality standards require such prohibition. Examples of such areas which may require the issuance of such regulations could include known shellfish grounds, enclosed inland lakes, areas adjacent to or located in boating marinas, areas adjacent to public beaches, and certain critical waters in the Great Lakes States. The Administrator will welcome such applications and will consider them with dispatch. No-discharge regulations issued by the Administrator will become effective no sooner than the effective dates of the initial standards and regulations issued under section 13(b). Until such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject wihout Federal participation.

Interested persons are invited to submit, in triplicate, their written views, comments, and recommendations concerning the proposed standards to the Administrator, Environmental Protection Agency, 1626 K Street NW., Washington, D.C. All relevant material received not later than 45 days after publication of this notice will be considered.

WILLIAM D. RUCKELSHAUS,
Administrator.

Dated: May 8, 1971.

PART 640—MARINE SANITATION DEVICE STANDARDS

Sec.
640.1 Definitions.
640.2 Standards.
640.3 Complete prohibition.
640.4 Analytical procedure.

Authority: The provisions of this Part 640 are issued under section 13, 70 Stat. 506, as amended, 33 U.S.C. 1163. Interpret or apply section (b)(1), 84 Stat. 100, 33 U.S.C. 1163(b)(1).

§ 640.1 Definitions.

For the purpose of these standards the following definitions shall apply:

(a) "Sewage" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes;

(b) "Discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(c) "Marine Sanitation Device" includes any equipment for installation on board a vessel and which is designed to receive, retain, treat, or discharge sewage, and any process to treat such sewage;

(d) "Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters of the United States;

(e) "Biochemical Oxygen Demand (BOD)" means the

oxygen, measured in milligrams per liter, required by bacteria while stabilizing the organic matter in a sample of sewage under aerobic conditions over a period of 5 days at 20° centigrade;

(f) "Coliform Bacteria" means all of the aerobic and facultative anaerobic, gram-negative, non-spore-forming, rod-shaped bacteria that:

(1) In the Tube-Dilution (most probable number) test, ferment lactose with gas formation within 48 hours of incubation at 35° centigrade, or

(2) In the Standard Membrane Filter Technique Test, produce a dark colony of bacteria with a metallic sheen on M-Endo Broth or Agar within 24 hours of incubation at 35° centigrade.

§ 640.2 Standards.

(a) A marine sanitation device which will prevent the discharge of untreated or inadequately treated sewage, and which will be required under these standards, is one which will prevent the discharge of an effluent containing visible floating or settleable solids; and from which the effluent, without dilution other than that normally used for flushing purposes, does not contain:

(1) Total coliform bacteria in excess of 240 per 100 ml.;

(2) Biochemical Oxygen Demand in excess of 100 mg./1; and

(3) Suspended solids in excess of 150 mg./1.

§ 640.3 Complete Prohibition.

A State may make a written application to the Administrator, Environmental Protection Agency, for the issu-

ance of a regulation completely prohibiting the discharge from a vessel of any sewage (whether treated or not) into particular waters of the State, or specified portions thereof. Such application shall specify with particularity the waters, or portions thereof, for which a complete prohibition is desired. The application shall also demonstrate that a complete prohibition is required by applicable water quality standards; and in this connection the application shall include; (a) a statement of the applicable water quality standards, (b) current data as to the condition of the waters or portions thereof which are the subject of the application, and (c) an explanation of the reasons why it is believed that the discharge of sewage from vessels may contribute to a violation of water quality standards in the waters or portions thereof which are the subject of the application. If, on the basis of the State's application and any other information available to him, the Administrator is unable to make a finding that applicable water quality standards require a complete prohibition of any discharge in the waters or portions thereof covered by the application, he shall state the reasons why he cannot make such a finding, and shall deny the application. If the Administrator makes a finding that applicable water quality standards require a complete prohibition of any discharge in all or any part of the waters or portions thereof covered by the State's application, he shall publish such finding together with a notice of proposed rule making, and then shall proceed in accordance with 5 U.S.C. 553. If the Administrator's finding that applicable water quality standards require a complete prohibition covering a more restricted or more expanded area than that applied for by the State, he shall state the reasons why his finding differs in scope from that requested in the State's application. No regulation under this section shall be issued to take effect sooner than the

effective date of the initial standards and regulations issued under section 13(b)(1) of the Act.

§ 640.4 Analytical procedures.

In determining the composition and quality of effluent discharged from marine sanitation devices the procedures contained in the current "Standard Methods for the Examination of Water and Wastewater," or subsequent revisions or amendments thereto, shall be employed.

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